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In the Supreme Court
of the United States

OCTOBER TERM 1953

No. 508

LEWIS C. DOUGALL,
Petitioner,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-53

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit.

The petitioner, Lewis C. Dougall, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on November 5, 1953 affirming the judgment of the United States District Court for the District of Oregon.

OPINIONS BELOW

The memorandum opinions of the District Court (R. 16 and 17) are not reported.

The opinion of the Court of Appeals (R. 99-107) is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 5, 1953. Jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended. 28 U.S.C., Sec. 347 (a).

STATUTE INVOLVED

Federal Employers' Liability Act (45 U.S.C.A. 51), Section 1, provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the

negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The 1939 amendment to Section 1 of the Federal Employers' Liability Act added to that statute the following paragraph:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

Section 5 of the Act (45 U.S.C.A., Section 55) provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *."

QUESTION PRESENTED

Under the contractual relations between respondent and Morrison-Knudsen Co., Inc. for the repairing of portions of respondent's main line roadbed by Morrison-Knudson Co., Inc., was petitioner protected by the Federal Employers' Liability Act for injuries sustained by him while engaged in repairing the roadbed of respondent?

For brevity we refer to Lewis C. Dougall as petitioner, to Spokane, Portland and Seattle Railway Company as respondent, to Morrison-Knudson Co., Inc. as contractor, and to the Federal Employers' Liability Act as FELA.

STATEMENT OF FACTS

Prior to January 30, 1946 respondent and contractor entered into a contract whereby contractor agreed to perform certain work upon respondent's roadbed and right of way in the proximity of Goodnoe, Washington, which work was to consist of clearing out ditches, sloping cuts, restoring and widening banks, and correcting drainage (R. 5). Said contract and a supplemental contract are identified as Exhibit 14 (R. 5, 94).

On and prior to January 30, 1946 petitioner was employed by contractor as a member of its construction crew engaged in performing work on respondent's roadbed and right of way pursuant to the said contract between respondent and contractor (R. 5). While so employed on said date petitioner sustained severe injuries to his person, including the amputation of his left leg and four toes from his right foot (R. 5). He also incurred head and body bruises, shock to his nervous system (R. 5) and unconsciousness, all of which injuries required hospitalization and medical care (R. 6).

In the performance of the work under contract, contractor used a motor truck and flat car, each with four wheels, with flanges thereon to enable said equip-

ment to run and operate upon respondent's rails and tracks. On the flat car was placed a standard ditcher, drag line outfit, boom, cable, drum and other equipment appropriate for doing the work. The power for pulling said flat car along said tracks was supplied by said motor truck. Neither said truck nor car was equipped with driving wheel brakes, a train brake system, or with automatic couplers. Said car was not equipped with secure grab irons or hand holds on the ends or sides of the cars, nor was it equipped with sill steps. Neither the truck nor the car was equipped with train brakes (R. 6).

Petitioner was injured thusly: "When we got ready to move . . . then I started to climb upon this flat car on the left so Bob could hear me, but in the meantime he had signalled to truck driver to go ahead . . . so the equipment was jolted. I fell, jolted off the car. My right foot went down on the rail and the wheels went over my toes. Then I lost consciousness and when I came to my leg was under the wheel of the truck," (Exhibit 13, pp. 31-35 and R. 9).

Following the happening of the accident, the State of Washington paid to petitioner or for his account the sum of $8690.70, of which $4826.70 was for hospitalization and doctors, all in accordance with its Workmen's Compensation Act (R. 6). Thereafter petitioner brought the present action against respondent under the FELA on the theory that he was an employee of respondent within the meaning of Section I of said Act as amended by the 1939 Amendment; and that contractor was not

an independent contractor, but a vice-principal or agent of respondent (R. 7). That the contract in question between respondent and contractor was entered into for the purpose of evading the FELA and other Federal Acts (R. 8).

Forthwith following pretrial order, May 20, 1952, (R. 3-13), oral argument was presented on petitioner's right to sue under the FELA. Four days later court entered following Memorandum Decision:

> "With great respect for experienced counsel, I am unable to distinguish this case from the Norman case, which of course binds me both by comity within this court, and by virtue of supremacy of the appellate court.
>
> "I should think that this proceeding might by amendment be converted into a third party proceeding—if plaintiff so desired—but of course both sides would be entitled to be heard as to this.
>
> "It seems regrettable that plaintiff should lose his remaining compensation payments. Because compensation payments are so inadequate under present conditions, I believe the modern trend is to give the injured workman control of his third party claim, if one exists, and not to bind him to the harsh doctrine of election.
>
> "It may appear to counsel that I am deciding this case hurriedly, but I have in mind plaintiff's interests, and I recall it was stated at the argument that the time was growing short within which plaintiff could renew his compensation claim or perhaps begin third party proceedings." (R. 16)

On Petition of Re-hearing, Court made and filed following:

> "1. Was Morrison-Knudson an independent contractor? Yes.

"2. Was there a violation of Section 5 of the Federal Employers' Liability Act? No.

"Findings of Fact may be prepared accordingly." (R. 17)

Findings of Fact and Conclusions of Law (R. 17-24) presented to which exceptions were made (R. 25-27). No hearing was had thereon and judgment of dismissal of petitioner's cause was entered July 11, 1952 (R. 28). From this judgment petitioner appealed to the United States Court of Appeals (R. 29-32), which affirmed the judgment of the District Court (R. 108). See opinion thereon (R. 99-107) in this appeal to this Court.

SPECIFICATIONS OF ERROR TO BE URGED

The United States Court of Appeals, Ninth Circuit, erred:

1. In affirming the judgment of the United States District Court of the District of Oregon.

2. In holding that as a matter of law petitioner was not entitled to the protection or benefits of the Federal Employers' Liability Act.

3. In holding that respondent in law could delegate to another its duty to keep in repair its facilities and instrumentalities used by it in furtherance of interstate commerce.

4. In holding that respondent could relinquish to another its right of control of the railroad and the repair thereof.

5. In holding that Morrison-Knudson Co., Inc. was an independent contractor of respondent.

6. In holding that the contract between respondent and contractor (Exhibit 14) was not in violation of Section 5 of the Federal Employers' Liability Act.

REASONS WHY CERTIORARI SHOULD BE GRANTED

First: The United States Court of Appeals, Ninth Circuit, has erroneously decided an important question of federal law of direct concern to petitioner and all railroad employees and of immediate and drastic consequence beyond the particular facts and parties involved. That is, in determining as a matter of law that a railroad may delegate to a private corporation the repair of its right of way of its railroad used by it in interstate commerce and thus deprive the men doing that work of their rights under the FELA, and thereby escape certain provisions of said Act. Dispatch Shops v. Railroad Retirement Board, supra.

Second: The decision of the United States Court of Appeals, Ninth Circuit, is in conflict with the decisions of this and the following courts, to-wit:

A. Kinzell v. Chicago, M. & St. P. R. Co., 250 U.S. 130, 63 L. Ed. 893.

B. Atlantic Coast Line R. Co. v. Treadway's, Adm'x, 120 Va. 735, 93 S.E. 560 (S. Ct. App. Va.), cert. den. 245 U.S. 760, 38 S. Ct. 191, 62 L. Ed. 540.

C. Linstead v. C. &. O. Ry., 276 U.S. 28, 48 S. Ct 241, 72 L. Ed. 453.

D. 5th Cir. Avondale Marine Ways, Inc. v. Joseph H. Henderson, Deputy Commissioner, 201 F. 2d 437.

E. 6th Cir. Erie Railroad Co. v. Margue, 23 F. 2d 664; Cimorelli v. New York Central Railroad Co., 148 F. 2d 575; Pennsylvania Railroad Co. v. Roth, 163 F. 2d 161 (certiorari denied 332 U.S. 830); Pennsylvania R. Co. v. Barlion, 172 F. 2d. 710.

F. 7th Cir. Miles v. Pennsylvania R. Co., 182 F. 2d 411.

G. 8th Cir. Wabash R. R. Co. v. Finnegan, Collector of Internal Revenue, 67 Fed. Supp. 194 (1946) U.S.C.A. 8th Cir., 160 F. 2d 891.

H. 9th Cir. Western Boat Building Co. et al. v. O'Leary, Deputy Commissioner, 198 F. 2d 409.

I. 9th Cir. Michael Kulukundis v. Olaf N. Strand, 202 F. 2d 708.

J. State of Washington—Hilliard v. Clifford, 236 Pac. 108; Luby v. Industrial Ins. Com., 112 Wn. 153, 191 P. 855 (1920).

K. Appellate Court of Illinois—Downs v. B. & O. R. Co., 102 N.E. 2d 537.

ARGUMENT

This case involves the repairs of an old railroad and not the construction of a new one. The work consisted of repairs of the railroad theretofore used by respondent in interstate commerce. Respondent controlled the premises at all times; there was no cessation whatever of interstate traffic. Edward B. Stanton, vice-president and general manager of respondent so testified (R. 60-61). Exhibits No. 10 and No. 11 are the time table and the

dispatcher's train sheet respectively of January 30, 1946. These documents schedule the trains of respondent that used these tracks on the very day and before and after the accident occurred in which petitioner was hurt.

The respondent's conductor who had charge of the work train on which petitioner was working with the immediate foreman of contractor had left the premises where the work was being done to go to the railway station to ascertain if any trains were running late, and in the absence of these men petitioner was instructed to convey directions to the operator of the drag line and was in the process of gettting on the flat car to convey the instructions when by a sudden jolt and jerk of the car by the motor truck, the petitioner was hurled down upon the tracks and sustained the injury complained about.

We assume that it is elementary that a railroad cannot delegate away any of its essential functions as a railroad to an independent contractor, and thus escape the obligations of the FELA. That, however, is exactly what happened in this case and it is because respondent so far has escaped the obligations of the FELA that this Writ of Certiorari is prosecuted.

A case in point as to the facts, Margue supra, held that despite such attempted delegation, the workman was still entitled to the benefits of the acts. In Margue, supra, the construction company had undertaken with its own employees to maintain the tracks of the railroad; the contract was to continue for a year, and either party could terminate it on 30 days' notice, but the railroad

could also terminate it and take possession and control of the work upon 24 hours' notice, if the railroad deemed it advisable. Basing its decision in large measure upon this cancellation provision of the contract, the court held that there was no real independent relationship set-up, but that the construction company was merely an adjunct of the railroad company. In case at bar by reason of the terms of the contract (Exhibit No. 14) the contract, inter alia, provides,

> "Whenever in the opinion of the railway company it shall be necessary or expedient for it that the work, or any portion of it should be stopped, or that the force employed should be diminished, the Railway Company may stop work or diminish the force, and the contractor shall have no claim for damage by reason thereof, but he shall stop the work, or reduce the force as the Railway Company may in writing direct, which writing shall be signed by the Chief Engineer, and shall be delivered to the Contractor, or in case of his absence, to some person on the work representing him, at least five days prior to such required stoppage or reduction."

In Linstead, supra, this court arrived at the solution of the problem by asking the question: Whose work was Linstead doing? Linstead was a conductor, hired and paid by Big Four Ry. By contractural arrangements between Big Four and C. & O. Ry., Linstead and crew with Big Four engine and caboose hauled train of empties and loads of C. & O. over C. & O. Railway tracks for Big Four connection. Linstead was killed through the negligence of C. & O. train following Linstead train. The court held that the work was that of the C. & O., and that C. & O. was liable in damages for Linstead's death. Court said:

> "We do not think that the fact that the Big Four paid Linstead's wages and that he could be discharged only by the Big Four, prevented him from being the servant of the C. & O. for the performance of this particular job."

As stated heretofore and as the record throughout will disclose, the respondent had control of its railroad at all times, its traffic never ceased. The contractor had to synchronize his work and the occupancy of the railway tracks to the schedule of the various and sundry passenger, freight and U. S. troop trains, and it was for this purpose that the railroad company had a conductor and two brakemen on this job to see that the interstate traffic of this common carrier was not interferred with. So, on the theory of control, we cite the case of Treadway, supra. The facts briefly were that A. C. L. Ry. was senior in location at Emporia. Southern Ry. wanted to cross A. C. L. and as a condition for that privilege A. C. L. exacted of Southern Ry. the cost of maintenance of the signal system, hiring and paying the employees, with the power to discharge them. One of the signalmen of Southern Rr. was killed by A. C. L. Action was instituted and A. C. L. claimed Treadway was not its employee and that Southern Ry. was to blame. Court held against A. C. L. saying that:

> "The ultimate power of control was possessed by the A. C. L. through its contract with the Southern Railway, which company was merely the agent of the A. C. L. to exercise the immediate control of Treadway, with the ultimate power of control remaining vested in the A. C. L. which had the power of control in question originally. It need not have parted with it. If it did, partly or wholly, it could

not thereby divest itself of the legal responsibility it was under to exercise such control."

In Kinzell, supra, the relationship of employer and employee did exist between Kinzell and the railroad. Kinzell was engaged in constructing an earth fill to take the place of a wooden trestle over which interstate trains were passing during the progress of the work * * * the exact situation in case at bar. The difference, however, being that Kinzell was on the payroll of the C. M. & St. P., whereas Dougall was an employee in name at least of the contractor. The Kinzell case distinguishes between construction work on not theretofore used railroad and on the repair and maintenance of work on a theretofore used railway. In deciding the Kinzell case, the court said:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

The court then says:

> "It is also settled that the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the Act."

It also said, he, Kinzell, was employed in keeping the interstate traffic which was in daily use clear and safe for interstate trains.

The Luby case, supra, is identical to case at bar. Luby was employed by contractor Gerske to clean and

paint some bridges on the main line of Northern Pacific Railway, which railroad had let its contract to Gerske to do this work. The contract provided that Gerske should personally superintend the work, furnish all labor and material, have full control of the men and be solely liable for personal injuries suffered by any of the workmen. Gerske obtained state compensation for his entire crew and complied with said Act. While engaged in the work, Luby sustained injuries from which he died. His wife sought state compensation for Luby's death, which was denied on the ground that Luby was engaged in interstate commerce and was not within the scope of the Workmen's Compensation Act. Supreme Court held that if Luby, at the time of his death, was employed in maintenance work upon a railroad engaged at the time in interstate commerce, he does not come within the scope of the Workmen's Compensation Act. The Legislature exempted from Workmen's Compensation Act all employees engaged in maintenance work upon railroads engaged in interstate commerce without regard to the fact whether they are employed to perform the work by the railway itself or by an independent contractor.

In Hilliard, supra, identical to case at bar, Great Northern Ry. entered into a contract with an independent contractor by which contractor agreed to improve the terminal yards at Skyhomish, the contractor to furnish all labor, equipment and material. Hilliard was employee of contractor and in prosecution of work was killed. His widow sought compensation under Workmen's Compensation Act. Claim was denied. Supreme Court of Washington upheld Compensation Commission, in

part saying, the doing of the work had for its immediate purpose the furthering of interstate commerce on the part of the railroad company, and the fact that the work was done by contract does not affect the situation. Federal Employers' Liability Act applies to employees engaged in the particular work, whether employed by the railroad company direct or by an independent contractor.

In Miles, supra, the court stated that a railroad cannot escape the liability imposed by the FELA by contracting with a contractor to take over the ordinary and necessary maintenance work on a track which is used in interstate commerce. That case makes the distinction between original construction work and maintenance work. The difference, the distinction in fact, is that if the railroad has been put to the use of interstate commerce its repairs and maintenance comes under FELA, whereas the original construction prior to its use by interstate commerce would be otherwise.

The Cimorelli case, supra, lays down the doctrines that Morrison-Knudson Co., Inc., referred to as contractor in this case, was not an independent contractor but rather was an employed agent of the S. P. & S. Railway Company. In that case one employee of the contractor was injured through the negligence of another employee of that contractor. The court there determined that both were employees of the N. Y. C. Ry. Company as well as employees of the contractor, and that Cimorelli therefore could recover for his fellow servant's negligence. In case at bar, on the other hand,

Dougall was on the payroll of the contractor and was injured solely through the negligence of the contractor's employees and by the very terms of the contract between the contractor and respondent which makes the contractor an employed agent of respondent. It follows logically that petitioner likewise is an employee of respondent. In the Cimorelli case the railroad contracted with the U. S. Government to operate in its railroad yards a temporary place for war material in transit. The contract provided that the identity of the merchandise contained in inbound cars was to be preserved. The railroad company contracted with a construction company to unload and reload the cars. Cimorelli was employed by the construction company and was injured while unloading freight from a box car. He brought suit against the railroad under the FELA contending that the contract between the railroad and the construction company was a subterfuge and therefore a violation of Section 5 of the FELA. The court held that Cimorelli, hired by the so-called independent contractor, was an employee of the railroad company, on the ground that the business to be performed was in reality the business of the railroad company and not of the independent contractor. The court pointed out that the railroad had control over the premises and the manner of performance of the work and that there was no independence left in the contractor. The case at bar is similar in principle, in theory and in fact with the Cimorelli case. Respondent at bar could not perform its functions as a common carrier by rail in its interstate commerce if it had turned over a part of its tracks to the control of a third party.

The Roth case, supra, involved a contract between a railroad and an independent contractor for work on a cost plus basis pertaining to unloading inbound cars, etc. Roth was an employee of the independent contractor and while employed in the work sustained injuries and brought suit against the railroad. The contention of the railroad was that the employer of Roth was an independent contractor and not its employee and not covered by the FELA. The railroad relied upon the Bond case decided in 1915 in which this court closed that case by saying:

> "Thus, being of opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

and Roth relied upon the Cimorelli case. The court followed the ruling in the Cimorelli case.

In Barlion, supra, Barlion was injured while engaged in loading and blocking operations of railroad cars in the defendant's freight yard which had been built by the railroad pursuant to contract with the Government. The accident occurred when a gondola car in which Barlion had been working collided with other standing cars when a defective hand brake failed to work. At the time of the accident Barlion was working for a contractor employed by the railroad to unload and remark and reload certain shipments. Barlion sued the railroad, claiming that he was its employee and the court based its opinion squarely on the Roth decision, the court pointing out that the railroad had the right of control to

the same extent as it did in the Roth case and that it was the right of control, rather than its exercise, that determines whether or not a contractor is an independent contractor. In case at bar the railroad always had control not only in theory but in law and in fact and exercised control at all times. The contractor played the role of a section gang. It worked on the tracks between trains. It had no control of anything and was simply an agent or section hand or employee of respondent. In the Barlion case the court said:

> "The whole project involved many interdependent details, the control of any one of which would not be surrendered without disorganization of the whole, and that, from the nature of the work, its performance could not be committed exclusively by the railroad to the contractor engaged in doing the unloading and reloading work and rendering the other services in question. The railroad had this right of control in the instant case to the same extent as it would in the Roth case; and it is the right of control rather than its exercise that determines whether or not a contractor is an independent contractor."

In Finnegan, supra, 8th Cir., lays down the definition of employees and whether they are the employees of an independent contractor or the railroad. The contract in this case provided that the contractor would unload and place in the coal chute of the railroad all coal required by it at a certain station. It also provided that in the event the service of the contractor was not satisfactory the railroad could declare the contract null and void forthwith. The contract had no termination date but either party could terminate on two days' notice. The contract provided that all work must be performed in a

manner satisfactory to the railroad. On this contract the court said:

> "Services called for, with but minor exceptions, related to operations integrated with the necessary business of plaintiff as a carrier and without which it could not operate as a carrier. The services were a functional part of plaintiff's business as a carrier. Unless the services were performed efficiently, plaintiff could not operate efficiently."

The Court further said:

> "If plaintiff can shed itself of its responsibility under the Act for employees who perform services of the character covered by the contracts offered in this case, on the theory the services are being performed by an independent contractor, the purpose of Congress in passing the Act can well nigh be destroyed."

The Court then quoted Despatch Shops v. Railroad Retirement Board, 80 U. S. App. D. C. 374, 153 F. 2d 644, as follows:

> "It is conceivable that everything from maintenance-of-way through engineering to bookkeeping might be done by so called 'independent' corporations. The application of this Act and of the other Acts passed for similar purposes and embodying the same language could be so severly limited as to render them of little worth in achieving the purposes for which they were passed."

In Overstreet, supra, it became necessary for this Court to define the scope of the Fair Labor Standards Act. In the course of that decision the Court made the following observations:

1. "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at pro-

tecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating substandard working conditions.

2. "A practical test of what "engaged in interstate commerce' means has been evolved in cases arising under the Federal Employers' Liability Act (45 U.S.C.A. Secs. 51 et seq.) which, before the (August 11) 1939 amendment (see 53 Stat. 1404, c. 685), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier 'in such commerce.' (April 22, 1908.) 35 Stat. 65, c. 149. In determining the reach of that phrase the case of Pedersen v. Delaware, L. & W. R. Co., 229 U.S. 146, 57 L. Ed. 1125, 33 S. Ct. 648, Ann. Cas. 1914C 153, 3 N.C.C.A. 779, held that an employee who was injured while carrying bolts to be used in repairing a railroad bridge over which interstate trains passed was engaged in interstate commerce within the meaning of the Liability Act. It was pointed out that tracks and bridges were indispensable to interstate commerce and 'that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

* * *

3. "We think that practical test should govern here. Vehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce. Cf. Covington & C. Bridge Co. v. Kentucky, 154 U.S. 204, 218, 38 L. Ed. 962, 968, 14 S. Ct. 1087, 4 Inters. Com. Rep. 649. Those

persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce' even as was the bolt carrying employee in the Pedersen Case, 229 U.S. 146, 57 L. Ed. 1125, 33 S. Ct. 648, Ann. Cas. 1914C 153, 3 N.C.C.A. 779, supra, because without their services these instrumentalities would not be open to the passage of goods and persons across state lines. And the same is true of operational employees whose work is just as closely related to the interstate movement."

4. "The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities."

Downs v. B. & O., supra, is analogous to case at bar. Downs contended that although a nominal employee of an independent contractor he was actually an employee of appellee and that the independent contractor was a mere agent and that the contract between the independent contractor and the railroad was a scheme to enable the appellee to evade its responsibility to its employees in violation of Section 5 of the FELA. The court found and agreed with Downs. The railroad contended that the independent contractor had exclusive control of the docks through its own employees, of which Downs was one. This, the court rejected. In case at bar, the contract (Exhibit 14) discloses that the contract itself did not make Morrison-Knudsen Co., Inc. an independent contractor. The court analyzed the agreement between the contractor and the B. & O. and pointed out several features of that contract, which the court will find very similar to various clauses in the contract (Exhibit 14) in case at bar between respondent

and Morrison-Knudsen Co., Inc. For example, in the Downs case, the court said:

> "Particularly significant upon the right of control exercised by defendant over the dock company is the fact that the contract provided for termination by the company upon five years' notice, but for termination by defendant upon only thirty days' notice for failure of the dock company to perform any of its covenants."

In case at bar, respondent could end the contract:

> "Whenever in the opinion of the Railway Company it shall be necessary or expedient for it that the work, or any portion of it should be stopped, * * * Railway Company may stop work or diminish the force * * * as the Railway Company may in writing direct * * * at least five days prior to such required stoppage or reduction."

A further inspection of the contract in case at bar (Exhibit 14) the court will find that the railroad controlled the contractor, e.g.,

> "The contractor will load the air dump cars and unload same where directed by railway company's representative with no extra compensation."

Then the court took up the argument of the B. & O. and used the following language, which is most apropos to case at bar:

> "We think that this argument begs the question. It is true that plaintiff was a nominal employee of the dock company and it is also true that the agreement under which the dock company operated designated said company as an independent contractor. However, where a question arises as to what the real relationship between parties is, the courts are not bound by the conclusions of witnesses or the terminology of agreements attempting to characterize the relationship, but the form of the

agreement must yield to its essence. Courts will look to all the circumstances of the transaction, and the employer will in the final analysis be the one whose work is being performed and who has the power of control over the work and the employee. Union Pacific Ry. Co. v. Chicago, etc., Ry. Co., 163 U.S. 564, 582, 16 S. Ct. 1173, 41 L. Ed. 265; Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772; Cimorelli v. New York Cent. R. Co., 6th Cir., 148 F. 2d 575."

Western Boat Bldg. Co., et al. v. O'Leary, Deputy Commissioner, Compensation District and Markovich, 198 F. 2d 409, was an appeal from a judgment of the U. S. District Court of Oregon dismissing appellants' petition for an order enjoining enforcement of a compensation award to appellee Markovich under Longshoreman's & Harbor Workers' Act. District Court held that such compensation cases fell within federal jurisdiction.

FACTS: Markovich was injured by falling over side of tug-boat, located on marine railway at yard of his employer while undergoing repairs and at the time of the repairs, the stern of the vessel was partially submerged in the waters of Puget Sound at high side.

HELD: 1. Workman injured by falling over side of tug-boat, located on marine railway at yard of his employer, while being repaired, was engaged in maritime employment so as to render his injuries compensable under Longshoreman's Compensation Act.

2. Even if state had adjudicated and granted award under State Compensation Act, such action would not

constitute bar to claimant's rights under Longshoreman's Compensation Act. District Court affirmed.

Appellant at bar contends that under the facts of his case he has the same rights as Markovich in the cited case. Since he was doing work in furtherance of interstate commerce and was as much an employee of appellee as if he had actually been on its payroll at the time he sustained his injuries and came within the protection of the FELA.

This decision was not only excellent in law but unique in its historical value as to the course such litigation had run and the changes or divergent views of the various courts. So, because of the contrary ruling of various courts, it is now deemed appropriate to submit cases following.

Michael Kulukundis v. Olaf N. Strand, 202 F. 2d 708, holds that a longshoreman is a seaman when working aboard a ship and is covered by the Jones Act. That is to say, the protection traditionally afforded seamen, has been extended to longshoremen working on board a vessel, on the theory that the longshoreman is doing a seaman's work and incurring a seaman's hazard. Appellant, in case at bar, submits that the logic of the cited case makes it the law of case at bar, where Dougall an employee of a private contractor working on a completed railway long used in interstate commerce, repairing the tracks and roadbed of such railway is covered by the Safety Appliance Act even though the railway did not own the equipment, but had permitted the defective equipment to be used on its line in the furtherance of interstate commerce.

Avondale Marine Ways,, supra, was on Writ of Certiorari to the U. S. Court of Appeals for the 5th Circuit to review a judgment affirming a judgment of a District Court allowing recovery for death in an action under the Longshormen's and Harbor Workers' Compensation Act. This court affirmed the 5th, saying in brief that death resulting from injuries on a barge located on a marine railway on navigable waters is within the provisions of the Longshoremen's and Harbor Workers' Compensation Act allowing compensation for death occuring from injury upon the navigable waters of the United States. In said action it was contended that the place where, and the circumstances under which, the death occurred were such that state law furnished the exclusive remedy, the District Court, and, on appeal, the Court of Appeals, decided against that contention and in favor of the administrative ruling which this Court on November 23, 1953 affirmed.

We now come to the last question:

Was the contract made to evade Sec. 5?

Fortunately the Supreme Court of the United States gives us the answer:

> "* * * The words, 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view." (P. B. & W. R. Co. v. Schubert, supra.)

The facts were that Schubert sued the railroad to recover damages for personal injuries and the railroad company set up a defense the acceptance of benefits under a contract of membership in the company's relief department, and the clarification of Section 5 of the FELA became a question for the court and the foregoing is the substance of the Court's opinion'

In McAdow v. K. C. W. R. Co., supra, Court said:

> "If the contract operates so as to defeat the statutory liability, it is void, regardless of the intent of the parties."

In Duncan v. Thompson, supra, Supreme Court reviews with approval the foregoing citations and many others, and holds that contracts, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void.

Erie Railroad Co. v. Margue, supra, deals with facts similar to case at bar. Section 5 came up for consideration. By contract, the contractor was required to comply with the state compensation laws of Ohio. The Court said:

> "This statute, in our opinion, applies to the contract under consideration. The only purpose there could have been, so far as we can see, for inserting into the contract the provision respecting the state Compensation Act, was to substitute the liabilities of that act for those that would have otherwise existed. The liability under the state statute is more certain than at common law or under the federal act, but, because of the smaller compensation given by the state act, it would be more economical, from the employer's standpoint, to operate under

that act than under any other law, state or federal, that might be applicable. In these circumstances, we have no trouble in believing that the intent of this provision was to evade the force and effect of the federal act, as it was also, perhaps, the main purpose of the contract to evade other federal legislation and control."

The Court also said:

"The maintenance of defendant's railroad tracks was essential to the exercise of its franchise rights. It undertook to delegate that duty to a construction company, which was largely organized and controlled by its former employees. We think one of the purposes of its contract with the construction company was to avoid the liabilities of the Federal Employers' Liability Act."

In case at bar, Exhibit 14, inter alia, provides:

"The Contractor shall indemnify the Railway Company against all loss, damage or expense resulting from any injuries to persons or damage to property caused by carrying on the work or any part thereof."

Court also said:

"In Philadelphia, B. & W. R. Co. v. Schubert, supra, it was decided that it made no difference whether the contract for the insurance was made with the actual intent of the parties to circumvent the statute, if the effect of the contract would operate so as to defeat the liability created by the statute."

McAdow brought this action to recover an amount alleged to be due under a contract of employment for loss of time caused by an injury received by him while in defendant's service. Judgment was rendered in his favor and the defendant appealed and the judgment was affirmed.

In Petersen v. Ogden Union Railway & Depot Co., supra, the Court said:

> "Regardless of the intention of the parties, if the practical effect of the contract or device is to exempt the carrier from any liability imposed by the chapter, the contract or device is void. Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603, 32 S. Ct. 589, 56 L. Ed. 911; McAdow v. Kansas City Western R. Co., 100 Kan. 309, 164 P. 177, L.R.A. 1917E, 539; Larson v. Lewis-Simas-Jones Co., 29 Cal. App. 2d 83, 84 P. 2d 296."

Petersen sued defendant for personal injuries sustained in the course of employment by the defendant. Before trial on the merits, on motion of defendant, the action was dismissed. Basis of dismissal was that prior to commencement of suit parties entered into an agreement, to-wit: Received of Railway Company $500.00 advanced on account of personal injuries sustained while employed as Carman Helper; such payment not being an admission of liability and to be deducted from any final settlement. Trial court held agreement was binding and plaintiff could not maintain the suit. Plaintiff contended agreement was void under Sections 5 and 6 of the FELA. The case was reversed with instructions.

Also:

> "The Contractor shall provide, at his own expense, public liability and property damage insurance in the principal sums of not less than $50,000/-$100,000 for public liability and $25,000/$50,000 for property damage for his own account, for subcontractors and the Railway Company, to cover any loss that may arise or become due growing out of injuries or death caused by, or in connection with, the operations covered by this contract. All such

policies shall be approved by the Railway Company as to the insurance company writing same, the amount, and the form of said policies."

SUI GENERIS

For the convenience of this court, there will be found in the Appendix herein the rulings of the District and Appellate Courts in the case of Norman v. S. P. & S. Ry. The case that the District and the Appellate Court cited as precedent for the case at bar. The Court will observe that neither the District Court nor the Appellate Court cited any authorities in the respective opinions in the Norman case.—Its sui generis.

CONCLUSION

It is respectfully submitted that the decision below is incorrect and in conflict with the decisions of this Court and several Court of Appeals and should be corrected, and that this Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

ELTON WATKINS,

Counsel for Petitioner,
Lewis C. Dougall.

APPENDIX NO. 1

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

ROBERT O. NORMAN,
Plaintiff,

vs.

SPOKANE, PORTLAND and SEATTLE RAILWAY CO., a Corporation,
Defendant.

101 F. Supp. 350

OPINION

JAMES ALGER FEE, District Judge:

Norman, according to the agreed facts, was an employee of Gilpin Construction Company, an established private corporation engaged in contracting and construction work of a general nature, including from time to time bridge and trestle repairs for railroads, among which was the defendant Spokane-Portland & Seattle Railway Co., a common carrier of persons and of property in interstate commerce. Gilpin had not rejected the Oregon Workmen's Compensation Act, and regularly made contributions to the State Industrial Accident Commission on behalf of all its employees. The Rockton Bridge of the railroad fell into disrepair. A contract was entered into between Gilpin and the railroad for the repair thereof. During the work, Norman was seriously injured by a fall from a scaffold, which he alleges was improperly protected. For this injury, he brought action

under the Federal Employers' Liability Act, upon the theory that the railroad is under a non-delegable duty to perform such work by its own employees and is therefore liable to any workman injured thereon. It was originally asked by plaintiff that the cause be tried by jury. However, the issues were finally submitted, both as to fact and law, to the Court.

There was an amended pretrial order drawn after conference, which practically reduced the case to the solution of the following question of law: "Where a railroad corporation engaged in interstate commerce contracts with an independent contractor for the construction, repair and maintenance of the railroad company's bridges and trestles used in interstate commerce, is it relieved from liability in damages under the Federal Employers' Liability Act for injuries to employees of the independent contractor occuring during the course of such work and caused by the independent contractor's negligent failure to provide a safe place and suitable equipment to the employees for such work?"

The cause was submitted upon the transcript of evidence taken in a similar case in the state court and the agreements contained in stipulations and in the pre-trial order. It is agreed that Gilpin was in fact a truly independent contractor acting under a bona fide contract with the railroad, which was not designed or intended as a scheme or artifice to evade the provisions of the Federal Employers' Liability Act. It is stipulated that the 1939 amendment of the Federal Employers' Liability Act has "no bearing on who are 'employees' of a rail-

road" under the Act. The parties have likewise agreed that the following decisions do not bear on the basic issue and may be disregarded:

"1. Decisions as to whether the work being performed by a particular railroad employee at the time of injury was within interstate commerce so as to vest jurisdiction of the action in federal courts.

"2. Decisions holding that particular factual situations by common law tests constituted the parties employer-employee rather than independent contractor-contractee.

"3. Decisions under the Railroad Retirement Act, Fair Labor Standards Act and Social Act where the question presented is whether an employee is engaged in interstate commerce within the scope of the particular legislation and/or whether the employee falls within the coverage of said legislation or is otherwise within the scope of such legislation, including that of the relationship of employer-employee."

The Court therefore finds that the facts as agreed in the amended pretrial order. Particularly, the Court finds as a fact that Norman was an employee of Gilpin and not an employee of defendant. The Court also finds that Norman was acting under the direction and control of Gilpin and not the defendant. Gilpin had unrestrained power to direct the manner and method of doing the work and the choice of its own employees. There was actually no attempt to delegate any responsibility by defendant, but simply a normal transaction of letting repair work to an independent contractor.

The Court is of opinion that a railroad company may employ a contractor to repair bridges. The duty of the railroad company to keep such transportation facilities in reasonable repair is not non-delegable so far as employees of the independent contractor are concerned. Here the independent contractor has been in business for many years and was covered under the Workmen's Compensation Act.

Of the hundreds of cases which have been reviewed by the Court, none suggests that an employee of a true independent contractor erecting or repairing a bridge on a right of way becomes an employee of the railroad company because the duty of construction and repair of such bridges cannot be delegated. No case suggests that the employee of an independent contractor becomes an employee pro hac vice under such circumstances. In view of the history of such construction by independent contractors ever since railroads have been in existence, it is necessary to answer that the employees of the contractor do not become employees of the railroad by any legal theory. This does not derogate from the duty of the railroad to construct and repair such structures. But the duty is not to plaintiff but to its passengers. If there were a question of control of the operation by the railroad, a possibility exists that liability of the railroad might be worked out. But the parties have entered the following stipulation, which disposes of this basis of liability as well as many others: "It is agreed by the parties that the Amendment to the Pretrial Order poses for this Court's determination a single question: 'May a railroad delegate to an independent contractor the

work of repairing, renewing and maintaining its tracks and bridges in the sense that the employees of an independent contractor who are injured in such work are not employess of the railroad within the scope and meaning of the Federal Employers' Liability Act?' "

The claim of Norman for this accident was allowed by the State Industrial Accident Commission. In view of the modern policy of administrative compensation for accidents, it would seem that no distinction should be created between construction work done by this established contractor in building a railroad bridge and in building an office tower. Just because his employer happened by chance to be building a railroad bridge instead of an office building is no reason for permitting plaintiff to gamble upon the windfall of a heavy verdict or the disaster of no recovery simply because he was incidentally working on railroad bridge construction. Nor, on the other hand, is it sound public policy, if he lost in such a gamble, to permit him to fall back into the safety net of the Workmen's Compensation Act.

The question submitted is decided in the affirmative, and the action is dismissed.

APPENDIX NO. 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT O. NORMAN, *Appellant,*	)	
vs.	)	
SPOKANE-PORTLAND & SEATTLE RAILWAY CO., a Corporation, *Appellee.*	)	No. 12,882 Dec. 5, 1951

Appeal from the United States District Court
for the District of Oregon

BEFORE: HEALY and POPE, Circuit Judges
LEMMON, District Judge

PER CURIAM

This is a suit against a railroad company under the Federal Employers' Liability Act by an employee of a bona fide independent contractor. The appeal is from a judgment dismissing the employee's suit. The judgment is affirmed for the reason given in the district court's opinion, ...F. Supp. .....

(Endorsed:) Per Curiam Opinion. Filed Dec. 5, 1951. Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 508

LEWIS C. DOUGALL,

Petitioner,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The trial court's memoranda are not reported but are found in the transcript of record (R. 16-17). The decision of the United States Court of Appeals for the Ninth Circuit is reported at 207 F. (2d) 843.

QUESTION PRESENTED

May an employee of a *bona fide* independent contractor maintain suit under the Federal Employers' Liability Act against a railroad to recover damages on account of personal injuries allegedly caused by the contractor's negligence?

STATEMENT OF THE CASE

On January 25, 1949, petitioner, a truck driver employed by Morrison-Knudsen Company, Inc. (hereinafter referred to as M-K) commenced an action in the United States District Court for the District of Oregon to recover over $340,000 damages for personal injuries sustained on January 30, 1946, near Goodnoe, Washington, while working on respondent's railroad right of way (R. 5, 33). Jurisdiction of the district court was invoked solely under and by virtue of the Federal Employers' Liability Act (hereinafter referred to as F.E.L.A.) (R. 4, 23).

The question of petitioner's right to maintain his action under the F.E.L.A. was segregated for separate trial without a jury, pursuant to the provisions of a pretrial order (R. 2-13). Certain facts were stipulated therein and a further stipulation of facts was filed at the time of trial (R. 3-6,14-15). At the trial, certain exhibits were introduced into evidence, including a long deposition of one of respondent's employees, as well as petitioner's deposition and photostatic copies of the original agreements between M-K and respondent (R. 38).

Thereafter, Mr. Stanton, respondent's Vice-President and General Manager, was examined at length by both parties (R. 39-75). The case was submitted to the court upon oral arguments and briefs.

In its Memorandum of Decision, dated May 24, 1952, the district court held that petitioner was precluded from maintaining suit under the F.E.L.A. by the rule of the *Norman* case (*Norman v. Spokane, Portland & Seattle Railway Company,* 101 F. Supp. 350 (D. C. Or.), aff'd per curiam, 192 F. (2d) 1020 (C. A. 9), cert. den. 342 U.S. 945, 72 S. Ct. 559, 96 L. Ed. 374 [copies of opinions printed in Petition, pp. 30-35]). However, upon petitioner's motion for rehearing, the court allowed his counsel to reopen the record and to introduce additional testimony and file further briefs. After again taking the case under advisement, the court filed its memorandum on the petition for rehearing, determining adversely to petitioner the two controverted issues set up in the pre-trial order under Issue I A (R. 17).

Thereafter, the district court entered comprehensive findings of fact and conclusions of law upon which judgment of dismissal was entered (R. 17-24, 28).

The findings and conclusions of the district court have been unanimously affirmed by the United States Court of Appeals for the Ninth Circuit (R. 99-105).

The following agreed issues of fact (R. 7-8) which determine the correctness of the judgment of dismissal have been adjudicated favorably to respondent by the two courts below:

1. Was plaintiff employed at the time and place of the accident by respondent, or by M-K?

2. Was M-K an independent contractor, or a vice-principal or agent of respondent, in performance of the work in question?

3. Was the contract between respondent and M-K entered into with the purpose or intent on the part of respondent to evade the F.E.L.A. by exempting itself from any liability to workmen performing said work, or was it made by the respondent for legitimate business reasons?

ARGUMENT

I. The Decision Below Is Clearly Correct.

A plaintiff who invokes the beneficial provisions of the Federal Employers' Liability Act must establish that at the time of the occurrence of the injury: (1) the defendant was a common carrier by railroad in interstate or foreign commerce, and (2) that he suffered injury while employed by the carrier in such commerce. It is fundamental that "* * * Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." (*Robinson v. Baltimore and Ohio Railroad Co.*, 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849; *Hull v. Philadelphia & R. Ry. Co.*, 252 U.S. 475, 40 S. Ct. 358, 64 L. Ed. 670; cf. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 69 S. Ct. 1317, 93 L. Ed. 1692.)

In this case, the findings of fact, founded upon substantial evidence, establish that at the time of injury petitioner was employed by and working for M-K as a member of one of its construction crews, that he was acting under M-K's exclusive direction and control, and that M-K had the unrestrained power to and did direct the manner and method of doing the renovating and improvement work on respondent's right of way (R. 21-22). Consequently, not being an employee of respondent, petitioner cannot maintain this action under the F.E.L.A.

The stipulation between the parties and the findings further establish that M-K was in fact a true independent contractor acting under a *bona fide* contract, and that it was not the object of said contract, nor the purpose or intent of either of the contracting parties, to enable respondent to exempt itself from any liability created by the F.E.L.A. (R. 20). Accordingly, petitioner cannot contend that the contract, which is not included in the transcript of record filed in this Court (R. 94, 109), is void, as in violation of Section 5 of the F.E.L.A. (45 U.S.C.A., § 55).

The law in this case was settled adversely to petitioner's contentions in *Chicago, R. I. & P. R. Co. v. Bond,* 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735. There, the railroad entered into a contract with the plaintiff's intestate for the shoveling of coal on a per-ton basis. He was to remove all coal from cars into coal chutes in such amount and at such times as required by the company. He was also to break the coal into appropriate sizes, gather up coal that fell from the chute pockets to the ground, and place the same on cars or engines as

desired by the company. The railroad was to furnish the necessary tools for the job and to keep a record of all coal delivered. Payments were based on the amount of coal handled as determined by daily reports of cars unloaded by the decedent. He was required to submit a report and furnish a certification from each engine man, hostler or other employee showing the number of tons of coal delivered to any engine. This Court reversed a judgment in favor of the plaintiff in an action brought under the F.E.L.A. on the ground that under the contract the railroad had not retained the right to direct the manner in which the work was to be done nor to control the results to be accomplished. Therefore, decedent was an independent contractor, not entitled to the benefits of the F.E.L.A. This Court also rejected the contention that the contract was in violation of Section 5 of the F.E.L.A. and held that the decedent was not incompetent to assume the relationship of an independent contractor to the railroad.

Two other decisions of this Court, *Robinson v. Baltimore and Ohio Railroad Co.*, 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849, and *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 41 S. Ct. 93, 65 L. Ed. 205, reach a similar result. They hold that where a railroad contracts with another company for the furnishing of facilities, or services, or the performance of work necessary to the fulfillment of its own obligations to the public, the contractor's employees can not claim the benefits of the F.E.L.A.

The Courts of Appeal for the Third, Fourth, Sixth, Seventh and Ninth Circuits have applied the established rule of these cases in *Shaw v. Monessen Southwestern*

Ry. Co., 200 F. (2d) 841 (C. A. 3); *Norfolk & W. R. Co. v. Hall*, 57 F. (2d) 1004 (C. A. 4); *Latsko v. National Carloading Co. et al.*, 192 F. (2d) 1020 (C. A. 6); *Miles v. Pennsylvania R. Co.*, 182 F. (2d) 411 (C. A. 7); *Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651 (D. C. Cal.), aff'd 174 F. (2d) 1022 (C. A. 9); and *Norman v. Spokane, Portland and Seattle Ry. Co.* (supra). In a recent annotation appearing in the American Law Reports (30 A.L.R. (2d) 517), the *Norman* case is cited as a leading decision on the subject, *"Injured or killed person as employee of carrier or independent contractor, with respect to Federal Employers' Liability Act."*

In view of the fact that this Court declined to grant a petition for a writ of certiorari in the *Norman* case (342 U.S. 945, 72 S. Ct. 559, 96 L. Ed. 374), the present application made by the same counsel borders on the frivolous.

In the *Norman* case, an employee of Gilpin Construction Company sued respondent under the F.E.L.A. Gilpin had contracted with respondent to do repair and maintenance work on its trestles and bridges, and to furnish the equipment, tools and labor to do the work. The basic findings of fact were essentially similar to those at bar; i.e., that Gilpin controlled the manner and method of performing the work, and that the contractual arrangement was *bona fide* and was not a scheme to evade the F.E.L.A. The very same questions of law were raised and decided adversely to petitioner in the *Norman* case as are now framed as Specifications of Error 3 and 4 (Petition, p. 7); to wit: whether or not the railroad could delegate its duty to repair and main-

tain its track and roadbed, and whether or not the railroad could relinquish its right of control over such work, so as not to be liable under the F.E.L.A. to an independent contractor's employee injured in the course of the work. The Court will note that the Court of Appeals for the Ninth Circuit gave particular attention to petitioner's plea that it overrule its *per curiam* opinion in the *Norman* case (192 F. (2d) 1020), which affirmed Judge Fee's decision (101 F. Supp. 350). The Court of Appeals held (R. 103):

> "We are satisfied that that opinion correctly states the law. We adhere to it. That holding is in keeping with decisions of the Supreme Court."

II. There Is No Conflict of Decision.

In the interest of brevity, respondent will not undertake an extensive review of the authorities cited by petitioner (Pet. pp. 8-9). However, for the purpose of analysis, they may be grouped and classified on the basis of the following controlling distinctions:

(1) In *Kinzell v. Chicago M. & St. P. R. Co.*, 250 U.S. 130, 39 S. Ct. 142, 63 L. Ed. 893, the relationship of employer-employee was conceded;

(2) *Atlantic Coast Line R. Co. v. Treadway's Admx.*, 120 Va. 735, 93 S.E. 560 (S. Ct. App. Va.), as well as *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U.S. 18, 48 S. Ct. 241, 72 L. Ed. 453, *Cimorelli v. New York Central R. Co.*, 148 F. (2d) 575 (C. A. 6), *Roth v. Pennsylvania R. Co.*, 163 F. (2d) 710 (C. A. 6), and *Pennsylvania R. Co. v. Barlion*, 172 F. (2d) 710 (C. A. 6), involved the doctrine of "loaned servant";

(3) In *Western Boat Building Co. v. O'Leary*, 198 F. (2d) 409 (C. A. 9), and *Avondale Marine Ways v. Henderson*, 201 F. (2d) 437 (C. A. 5), decided under the Longshoremen's and Harbor Workers' Compensation Act, there was no question as to an employment relationship;

(4) *Hilliard v. Clifford*, 134 Wash. 590, 236 P. 108 (S. Ct. Wash.), and *Luby v. Industrial Insurance Company*, 112 Wash. 153, 191 P. 855 (S. Ct. Wash.), were decided under a section of the Workmen's Compensation Act of Washington long since amended;

(5) *Wabash R. R. Co. v. Finnegan*, 67 F. Supp. 94 (D. C. Mo.), was an action brought under the Carrier Taxing Act of 1937, which contains its own definition of "employee" (45 U.S.C.A. § 261(b) (d)), cf. *Nicholas v. Denver & Rio Grande Western R. Co.*, 195 F. (2d) 428 (C. A. 10);

(6) *Erie R. R. Co. v. Margue*, 23 F. (2d) 665 (C. A. 6), and *Downs v. Baltimore & Ohio R. Co.*, 102 N.E. (2d) 537 (App. Ct. Ill.), involved attempts by railroads to evade the liability of the F.E.L.A. by setting up as "independent contractors" mere straw men whose operations were controlled in great detail by the carriers;

(7) *Kulukundis v. Strand*, 202 F. (2d) 708 (C. A. 9) was an admiralty libel by a stevedore against a shipowner. It was not a Jones Act case, as petitioner states (Pet. p. 24);

(8) Finally, the court's holding in *Miles v. Pennsylvania R. Co.*, 182 F. (2d) 411 (C. A. 7), supports respondent, rather than petitioner.

CONCLUSION

It is quite obvious that the questions raised in this case are of no concern to the thousands of employees of interstate carriers who are covered by the F.E.L.A., for they are railroad men, not truck drivers, as was petitioner.

Petitioner argues that if the decision below is allowed to stand, railroads can avoid liability to their own employees under the F.E.L.A. by hiring financially worthless contractors to take over railroad operations, and then by transferring their employees to the payroll of the so-called "independent contractors."

If there were no other protection, Section 5 of the Federal Employers' Liability Act (45 U.C.S.A. § 55) would be an effective bar to any such scheme. It is therein provided that any contract, the purpose or intent of which is to enable any common carrier to exempt itself from any liability created by the Act, shall to that extent be void. However, in the case at bar, the courts below have found on substantial evidence that it was not the object of the contract between respondent and M-K, nor the intent of either of the contracting parties, to enable respondent to exempt itself from any liability created by the provisions of the F.E.L.A. (R. 20).

Respondent does not claim any immunity from suit by petitioner in a so-called "third-party action" to recover damages under principles of common law liability. However, the benefits of the F.E.L.A. are only available to respondent's own employees. On the other hand, petitioner, as an employee of M-K, has received and

will take further benefits under the Workmen's Compensation Act of the State of Washington, a remedy not available to respondent's crews employed in interstate commerce (see *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 73 S. Ct. 340, 97 L. Ed. 279).

In view of the trial court's findings of fact and the stipulations between the parties, the decision below is clearly correct. No substantial question of federal statutory interpretation remains open on the record presented by petitioner. The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
JAN 29 1954
HAROLD B. WILLEY, Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 508

LEWIS C. DOUGALL,
Petitioner,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATUTE

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 508

LEWIS C. DOUGALL,

Petitioner,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. CERTIORARI. Respondent makes a rather fantastic request of this Court for a summary denial of petitioner's prayer for a writ of certiorari, or so it seems to petitioner. On page 7 of respondent's brief occurs the following:

> "In view of the fact that this Court declined to grant a petition for a writ of certiorari in the Norman case (342 U.S. 945) the present application made by the same counsel borders on the frivolous."

Counsel for petitioner does not know what the Journal of the Court shows, if anything, on the denial of certiorari in the Norman case; but labors under the impression that it is the doctrine of this Court that a denial of certiorari has no weight as a precedent, and in the particular case (Norman) it means only that further review will not be entertained. Counsel may be wrong; he hopes that he is, for if the Court found error in denying Norman's petition for writ of certiorari, maybe it could purge said error from its records and thus open the door to Mr. Norman so that he might ultimately obtain some relief for his terrible injury sustained by him when he was hurled to the ground 60 feet, all due to the negligence of the contractor of the railroad, the S. P. & S., (the same one as in the case at bar), which work was repairing a trestle used in the railroad's main line in its interstate commerce.

The wish is father to the thought in this observation; however, in connection with the respondent's request for dismissal, it is suggested that the significance of a denial of certiorari may be educational to respondent, Bench and Bar in general, by perusal of the opinion by Mr. Justice Frankfurter wherein, inter alia, was said:

> ". . . all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding

the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." Maryland v. Baltimore Radio Show.

In view of the charge of frivolity, let us examine the criticism former Mr. Justice Roberts made of this Court in granting certiorari in Bailey v. Central Railroad of Vermont, and use those observations as a yardstick to see if the petition herein is in fact frivolous.

On this subject, Mr. Roberts said:

> "And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed."

Petitioner claims that this case comes within the yardstick laid down by Mr. Roberts, because:

(1) The decision involves an important question of law;

(2) The decision does create a diversity of decisions in lower courts;

(3) The decision will seriously affect the administration of the law in other cases.

Petitioner has stated, on pages 8 and 9 of his petition, his reasons why certiorari should be granted. These reasons may be summed up briefly: The lower courts

have determined as a matter of law that a workman engaged in repairing the roadbed and mainline tracks of a common carrier used by it in furtherance of interstate commerce and injured while doing this work cannot have protection under FELA where the common carrier employed a private corporation to perform this work with its own men, despite the fact that the contract for the performance of the work to be done for respondent by the contractor reserved to respondent the right to control the manner, means and result of such work, with the additional right to terminate such contract at will (Exhibit 14).

II. QUESTION. Let us restate the question presented to this Court, as to whether or not certiorari should or should not be granted; let's find out what is the question.

Question as stated by Petitioner:

Under the contractual relations between respondent and Morrison-Knudsen Co., Inc. for the repairing of portions of respondent's main line roadbed by Morrison-Knudsen Co., Inc., was petitioner protected by the Federal Employers' Liability Act for injuries sustained by him while engaged in repairing the roadbed of respondent?

Question as stated by Respondent:

May an employee of a bona fide independent contractor maintain suit under the Federal Employers' Liability Act against a railroad to recover damages on account of personal injuries allegedly caused by the contractor's negligence?

III. LAW. The question as stated by respondent is not comprehensive enough, for if the work of the employee were original construction the answer would be in the negative; on the contrary, if the work were repair work, the answer would be in the affirmative. The 7th Circuit (Miles v. Penn Ry., supra) considered this question wherein certain work was original construction, other work was repair work, and the employee was engaged on both. It became necessary to determine on which he was injured, whether on the original construction of a new railway, or the maintenance of an old one. On that problem the Court said:

> "Admittedly the defendant could not have escaped the liability inmposed by this Act (FELA) by contracting with a contractor to take over the ordinary and necessary maintenance work on track which it used in interstate commerce."

The same question was considered in Erie Ry. v. Margue, supra, where it was held that despite such attempted delegation the workman was still entitled to the benefits of the Act. Likewise, the same question arose and was similarly disposed of in Roth v. Penn Ry. Co., supra.

Case at bar rests on the Norman case which holds otherwise and stems from an observation made by the Court in Erie Ry. Co. v. Margue, to-wit:

> "It might well be argued that the duty of a railroad company to maintain its right of way, over which it and it alone operates its trains, cannot be delegated to another, so as to relieve the company of any part of its responsibility therefor—certainly not as to the public which it serves, AND PER-

HAPS NOT AS TO THOSE WHO WORK UPON ITS TRACKS."

The Norman case, which was decisive of case at bar, holds that it can escape such responsibility as to those who work upon its tracks. Norman decision says:

> "In view of the history of such construction by independent contractors ever since railroads have been in existence, it is necessary to answer that the employees of the contractor do not become employees of the railroad by any legal theory. This does not derogate from the duty of the railroad to construct AND REPAIR such structures. But the duty is not to plaintiff but to its passengers."

So it will be noted that the Court in the Norman and case at bar makes no distinction between original construction of a railroad, never used in interstate commerce, and the repairs of tracks and trestle of a railroad used in the furtherance of interstate commerce; but held that both can be delegated to another and those injured in either case have no protection under the FELA. On this law of the Norman case, case at bar laid down the doctrine that petitioner had no protection under the FELA despite the fact that he was helping to repair the main line tracks of respondent which had been used theretofore for years, and used every hour of the day during the time of the repairs, and ever since. The courts are unanimous in holding that a railroad cannot delegate to another its duty to repair its tracks and trestles, and evade its responsibility under the FELA to any workman injured while engaged therein, the Norman and instant case excepted. The error the District and Appellate Courts made in the Norman case, the re-

spondent would now have pyramided and the Norman case made as the leading decision on the question, and thereby open the door for the railroads of the country to hire independent contractors to do all repairs of all facilities used in the furtherance of interstate commerce and thusly assign the FELA to an innocuous disquietude.

The Norman decision (p. 33, Petition for Writ of Certiorari) says:

> "If there were a question of control of the operation by the railroad, a possibility exists that liability of the railroad might be worked out."

In fact, there is never any question or doubt of ultimate control. The law is unanimous that the common carrier of the railroad in question possesses ultimate control,—and if it fails to exercise it, it does so at its peril. It was this rule of law that exempted the Southern Ry. and held A. C. L. responsible in Treadway v. A. C. L. In case at bar it is admitted that the railroad controlled and constantly used the railroad twenty-four hours of every day during the time of repairs. On the very day Petitioner Dougall sustained his injuries, the time table and the dispatcher's train sheet (Exhibits 10 and 11 respectively) certify to the control and the use of the tracks under repair. Consequently, there is no escape, under the theory of control and whose work was being done, from holding the respondent liable.

The District and Appellate Courts ignored these distinctions and judicially declared that repairing of tracks and trestles could be delegated, and lifted beyond

the protection of the FELA all workmen injured in said work.

Surely respondent itself would not seriously contend that the work was that of Morrison-Knudsen Company, a private corporation, whose contract (Exhibit 14) was nothing more or less than an employment contract of a section foreman, which contract in truth was a device to enable respondent to evade its responsibility to its employees under the FELA, and to that extent was void under Section 5 of the Act. Erie Ry. v. Margue (6th Cir.).

There is no bona fide independent contractor mixed up in this law suit. Not that that fact would make any difference, nevertheless, respondent evidently thinks that it will help it, and so it baldly states as a fact that which is in dispute.

Morrison-Knudsen Co., a private corporation, was employed by respondent (Exhibit 14) to repair its road-bed, etc., of its main line. The work was respondent's work. Respondent controlled the premises, and retained the right to direct the work and the power to terminate the contract at its pleasure.

It was work in furtherance of interstate commerce and—bona fide or no bona fide contractor—the duty was that of respondent which it could neither shirk nor evade; but regardless of who did the work, respondent was in law bound to respond in damages to any person injured while engaged in repairing instrumentalities used in furtherance of interstate commerce.

Let it be said to this Court's credit that practically the identical issue has always been met and mastered by somewhat different answers—sometimes under the law of agency; sometimes pro hac vice; sometimes under Section 5; sometimes under loaned servant doctrine; sometimes under whose work was it; sometimes under theory of control—and on the question of control, it is not whether control is in fact exercised throughout, but, rather, whether the right to control remains in existence throughout the course of the work. This Court in Standard Oil Co. v. Anderson, supra, puts it in these words:

> "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed,—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."

The Court's attention is invited to the 1939 amendment of the Federal Employers' Liability Act, which reads:

> "* * * Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Title 45, sec. 51, U.S.C.A.)

Whatever might have been the case before this amendment, it is respectfully submitted that the language of said amendment is definite and broad enough to include the work which petitioner was hired to do and was doing on the main line of the respondent, and such work was clearly part of the railroad's work and within the protection of the Act, and which duty it could not delegate.

Petitioner disagrees with respondent's interpretation of the Act, when it says:

> "It is fundamental that . . . Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." (Its brief, p. 4.)

In fact, this Court has said that employment is not limited to the conventional relation of master and servant, i.e., any person whose work furthers the interstate commerce of a common carrier shall be considered the employee of such carrier and shall be entitled to the benefits of the Act. This is the rule laid down by this Court in the cases immediately following.

The existence of the relation of master and servant is determined by ascertaining whose work is being done. In case at bar the work was respondent's and not that of Morrison-Knudsen Company. Standard Oil Co. v. Anderson, supra; Jones v. George F. Getty Ore Co. (10th Cir.); Walling v. McKay (8th Cir.).

Employment, within the meaning of the FELA, is not limited to the conventional relation of master and

servant. N. C. Ry. Co. v. Zachary; Philadelphia B. &. W. R. Co. v. Smith; A. C. L. v. Tredway; and Linstead v. C. & O. Ry.

If the work being done is that of the railroad, that is controlling even if the parties call the party doing the work an independent contractor. Rutherford Food Corp. v. McComb; U. P. Ry. v. C. R. I. & P. Ry. Co.; Moore v. Indus. Com. of Ohio (Ohio). But as said before, the repairing of tracks, etc., is the duty of the carrier which cannot be shirked by lugging in a third party.

The trend of federal decisions and of congresseional action has been toward a liberalization of the FELA and a broadening of the scope of responsibility. Lavender v. Kurn; Ellis v. U. P. Ry.; O'Donnell v. Elgin J. &. E. Ry.; Bailey v. Central of Vermont Ry.

It is submitted that, under the 1939 amendment, if any person was injured while engaged in repairing the tracks of respondent used by it in furtherance of interstate commerce, whether the person was an employee and on the payroll of a lessee-common carrier of respondent, or an employee and on the payroll of a bona fide independent contractor employed by respondent, or an employee and on the payroll of a private industrial corporation, or partnership, or individual employed by respondent to repair its tracks, the respondent would be liable and the workman so injured could maintain his action against respondent for damages. Otherwise, if the rule contended for by respondent and upheld by the Norman case and case at bar, the result is best expressed in Despatch Shops v. Railway Retirement Board:

> "It can be readily seen that the railroad would be free to take from under the act virtually all of their workers whose employment is in the supporting activities, through the simple expedient of setting up wholly owned corporate affiliates to perform these services. It is conceivable that everything from maintenance of way through engineering or bookkeeping might be done by so-called 'independent contractors'; the application of this Act and of the other Acts passed for similar purposes and embodying the same language could be severely limited as to render them of little worth in achieving the purpose for which they were passed."

The respondent places considerable reliance upon the case of Chicago R. I. Etc. P. Ry. Co. v. Bond. The chief difference between that case and case at bar is that in the Railway v. Bond case, the Railway Company was in a position where it really could turn over the details of doing part if its work to an independent contractor, and allow him to remain independent. In the instant case respondent did not have that freedom of action. It was duty-bound to perform its interstate commerce activities and which, in fact, it did; and in fact it was while the worktrain was in the process of clearing the track for respondent's trains that Petitioner was injured by the reckless handling of the flatcar upon which Petitioner was riding and from which flatcar he was knocked off and down upon the tracks under said flatcar.

The Bond case occured 23 years prior to the 1939 amendment. Without question an identical case now would receive a contrary ruling.

There is another distinction to bear in mind between the two cases, and that is, in the instant case Petitioner was engaged in interstate commerce at the time. In Railway v. Bond the Court closed its decision by saying:

> "Thus, being of opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

So, it would seem that from a consideration of the nature of the work Petitioner and others were doing, respondent could not have discharged its duties as a common carrier in furtherance of its interstate commerce if it had given control of its tracks to the contractor.

Respondent cites two other cases which have less bearing on the question at issue than does the Railway v. Bond case. The two cases are Robinson v. B. & O. R. Co. and Wells, Fargo & Co. v. Taylor. Robinson was a Pullman porter and in truth was on the train simply in the character of a servant of another master by whom he was hired, directed and paid, and at whose will he was to be continued in service or discharged. The Taylor case involved an express messenger in charge of express matter which a railway company was transporting for the express company in an express car furnished by the railway company under a contract which gave the express company the exclusive privilege of conducting an express business, the railway company to provide the motive power, and the express-man was on the train as an employee, not of the railway company but of the express company by which he was employed, directed,

and paid. Neither Robinson nor Taylor was engaged in interstate commerce nor were their employers common carriers by rail, and it is respectfully submitted that they have no value whatever toward the solution of case at bar. Nevertheless, it's these and cases like them that respondent has used to obtain from the District Court of Oregon and the Ninth Circuit favorable decisions. In this connection the Court will find that neither the District nor the Appellate Court cited a single case in support of the decisions in the Norman case.

It is therefore respectfully petitioned that a writ of certiorari as prayed for be granted.

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